Supreme Court, U.S.
FILED
AUG 17 1998
OFFICE OF THE CLERK

No. 98-90

In The Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD BOLT, M.D., et al.,

Petitioners,

v.

DAYTONA COMMUNITY HOSPITAL; ORMOND BEACH MEMORIAL HOSPITAL; RICHARD BOYE, M.D.; RALPH MARINO, M.D.; SHED ROBERSON, M.D.; and ALVIN SMITH, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT ORMOND BEACH MEMORIAL HOSPITAL

G. Bruce Hill, Esquire
Counsel of Record
ADAMS, HILL, REIS, ADAMS,
HALL & SCHIEFFELIN
1417 East Concord Street
Orlando, Florida 32803
(407) 896-0425

Counsel for Memorial Hospital of Ormond Beach

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNDER AN ABUSE OF DISCRETION STANDARD, PROPERLY AFFIRMED THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA'S DENIAL OF PETITIONERS' MOTIONS FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(4) & (6).

PARTIES TO THE PROCEEDINGS

Petitioners are RICHARD A. BOLT, M.D., and RICHARD A. BOLT, M.D., P.A.

Respondents are MEMORIAL HOSPITAL OF ORMOND BEACH; RICHARD BOYE, M.D.; RALPH MARINO, M.D.; SHEDRICK ROBERTSON, M.D.; ALVIN SMITH, M.D.; and DAYTONA BEACH COMMUNITY HOSPITAL n/k/a ATLANTIC MEDICAL CENTER-DAYTONA.

TABLE OF CONTENTS

PAGE

Question Presented i

Parties to Proceeding ii

Table of Contents iii

Table of Authorities ..... iv, v

Brief in Opposition to Petition
for Writ of Certiorari 1

Reply to Statement of the Case 1

Reason for Denying Writ 8

Conclusion 17

TABLE OF AUTHORITIES

Page

Cases

Ackermann v. United States,
340 U.S. 193, 71 S.Ct. 209 (1950) 15

Bolt v. Halifax Hosp. Medical Center,
851 F.2d 1273 (11th Cir. 1988) [Bolt I] 3

Bolt v. Halifax Hosp. Medical Center,
861 F.2d 1233 (11th Cir. 1988 (en banc) [Bolt II] 4

Bolt v. Halifax Hosp. Medical Center,
874 F.2d 755 (11th Cir. 1989) (en banc) [Bolt III] 4

Bolt v. Halifax Hosp. Medical Center,
891 F.2d 810 (11th Cir. 1990),
cert. den., 495 U.S. 924, 110 S.Ct. 1960 (1990)
[Bolt IV] 2, 4

Bolt v. Halifax Hosp,. Medical Center,
980 F.2d 1381 (11th Cir. 1993) [Bolt V]
rehearing den. 988 F.2d 1220 (1993) [Bolt VI] 4

Bolt v. Halifax Hosp. Medical Center,
(unpublished decision) Case No. 94-3149
(11th Cir.) (1995) [Bolt VII] 5

Griffin v. Swim-Tech Corp.,
722 F.2d 677 (11th Cir. 1984) 14

Klapprott v. United States,
335 U.S. 601, 69 S.Ct. 384 (1949) 14

Liljeberg v. Health Serv. Acquisition Corp.,
486 U.S. 847 108 S.Ct. 2194 (1988) 14

Lubben v. Selective Services System Local Bd. No. 27,
453 F.2d 645, 649 (1st. Cir. 1972) 9

Marshall v. Board of Education,
575 F.2d 417 (3d Cir. 1978) 9

Shores v. Sklar
885 F.2d 760 (11th Cir. 1989)
cert. den., 493 U.S. 1045, 110 S.Ct. 843 (1990) 16

Swift & Co. v. United States,
276 U.S. 311, 48 S.Ct. 311 (1928) 16

United States v. Alpine Land & Reservoir Co.
984 F.2d 107 (9th Cir. 1993);
cert. den., 510 U.S. 813, 114 S.Ct. 60 (1993) 14

Others

Fed. R .Civ. P. 60(b)(4) 5-10

Fed. R. Civ. P. 60(b)(6) 5-7, 13-16

Supreme Court of the Untided States, Rule 10 8

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, MEMORIAL HOSPITAL OF ORMOND BEACH ("Ormond"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

REPLY TO STATEMENT OF THE CASE

Ormond submits the following reply to the Statement of the Case to present to the Court the areas of disagreement with the statement of facts submitted by Petitioners, and to supply important information that has been omitted. In an attempt to color the proceedings below, Petitioners have presented the Statement of the Case in a biased and argumentative fashion; as such, Respondent is dissatisfied with Petitioners' presentation of the Statement of the Case and must therefore reject same.

The Complaint in this action was filed on March 23,

1982.[1] The Plaintiffs are Dr. Richard A. Bolt, a general surgeon, and his Professional Association ("Bolt"). Bolt moved to Daytona Beach in the Summer of 1979 and was granted probationary staff privileges at the following three Hospitals: Halifax Hospital Medical Center ("Halifax"), Daytona Community Hospital ("DCH") and Ormond. All three Hospitals are located in Volusia County, Florida.

Two years later, in the Summer of 1981, at the conclusion of his mandatory probationary period, Dr. Bolt filed applications at each of the Hospitals for permanent staff privileges. In October 1981, he converted his application to Ormond to one for "consulting" staff privileges.

The Complaint charged that the Hospitals and five local physicians violated the Federal Antitrust and Civil Rights laws

---

[1] The facts set forth in this introduction are taken from the district court and Eleventh Circuit opinions in this case, Bolt v. Halifax Hosp. Medical Center, slip op., Dkt. No. 82-122-ORL-CIV-18 (M.D. Fla. Mar. 21. 1984), aff'd in part, rev'd in part, and remanded, 891 F.2d 810 (11th Cir. 1990), cert. denied, 110 S.Ct. 1960 (1990)

by "conspiring" to deny Bolt's applications for permanent staff privileges, and by failing to afford him due process in the administrative "peer review" proceedings, conducted by the medical staff at each Hospital and required by Florida law.

The case then went to trial in February 1984 before the Honorable Richard B. Kellam, United States District Judge for the Eastern District of Virginia, Norfolk Division, sitting by designation. The District Court required Bolt to prove the "conspiracy" he was alleging, a dispositive issue as to his Federal Antitrust claims of a "conspiracy" in restraint of trade and a "conspiracy" to monopolize, before proceeding to proffer any alleged co-conspirator hearsay. However, Bolt failed to proffer any evidence of a conspiracy and the court directed a verdict for the Defendants on those claims and dismissed all pendent state claims. The Eleventh Circuit issued a panel opinion in 1988, 851 F.2d 1273 (11th Cir. 1988) [Bolt I], which was then vacated, 861 F.2d 1233 (11th Cir. 1988) (en banc)

[Bolt II], and remanded to the panel, 874 F.2d 755(11th Cir. 1989) (en banc) [Bolt III], which issued its final opinion, noted above, in January 1990., 891 F.2d 810 (11th Cir.). cert. den., 110 S.Ct. 1960 (1990) [Bolt IV].

The Eleventh Circuit agreed that the trial evidence was insufficient to justify sending the case to the jury, but reversed on the grounds that one proffered "expert" witness, Dr. E.R. Woodward, should have been allowed to testify. Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 827 (11th Cir.), cert. den., 110 S.Ct. 1960 (1990) [Bolt IV].

Bolt's trial was set for February 3, 1992. A week before trial, Halifax filed an emergency motion to stay the proceeding which was granted by the Eleventh Circuit on January 27, 1992. Additionally, the Court opined that state action immunity applied to Halifax. Bolt v. Halifax Hosp. Medical Center, 980 F.2d 1381 (11th Cir. 1993) [Bolt V], rehearing den. 988 F.2d 1220 (1993) [Bolt VI].

The case was set for trial on remand on the District Court's own Motion for Rehearing. The case was continued several times and was finally set for trial before the Honorable Robert Merhige, Jr., for the trial period beginning August 8, 1994 (ER-1). On the 4th day of trial, Bolt entered into a Voluntary Dismissal with Prejudice of all pending claims against all Defendants (ER-96). Approximately two months later Bolt had a change of heart, and he filed a pro se Notice of Appeal with the Eleventh Circuit on October 3rd, 1994 (ER-98). The Eleventh Circuit dismissed Bolt's appeal in an unpublished decision (ER-100). [Bolt VII]. On July 16, 1996, nearly two years after Bolt's Voluntary Dismissal, and fourteen years after the initial Complaint was filed, Bolt filed a motion pursuant to Fed. R. Civ. P. 60(b)(4) and (6) to vacate the Judgment which dismissed his claim (ER-107).

On August 14, 1996, the Honorable Robert M. Merhige, Jr., denied Bolt's Motion for Relief from Judgment premised

upon Rule 60(b)(6) alleging fraud committed by his counsel as untimely (R-112). It was further Adjudged and Ordered that Bolt would be granted a period of fifteen (15) days to set forth facts as distinguished from conclusory statements which he contended deprived him of due process of law and thereby entitled to relief under Rule 60(b)(4). (Id.)

On August 21, 1996, Bolt responded with his Amended Motion #1 in Support of 60(b)(4) Relief Regarding "Due Process of Law" Concerns (R-115). Additionally on August 21, 1996 (despite the fact he did not have authority to do so), Bolt filed a Motion for Reconsideration of Judge Merhige's Order Denying Relief from Judgment under Rule 60(b)(6)(R-114). On October 21, 1996, Judge Merhige filed a Memorandum Opinion giving a basis for his denial of Bolt's reconsideration for Relief from Judgment Under 60(b)(6) (R-123). Additionally, Judge Merhige signed an Order that Bolt's Motion for Re-Consideration Under Rule 60(b)(6) was denied

(R-124). Moreover, Judge Merhige filed a Memorandum Opinion indicating his reasons why Bolt was not entitled to relief under 60(b)(4) (R-123). Finally, Judge Merhige also denied Bolt's Request for Relief Under 60(b)(4) Regarding "Due Process of Law" Concerns (R-124). As a result of Judge Merhige's final Orders regarding Rule 60(b)(4) and (6), Bolt filed a Notice of Appeal on November 18, 1996 (R-125).

On October 27, 1998, the Eleventh Circuit in a three sentence unpublished opinion, affirmed the United States District Court of the Middle District of Florida's denial of Bolts' Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(4) & (6) (see Petitioners' Appendix "B"). From there, Bolt filed a Petition for Rehearing and Suggestion of Rehearing, en banc. On May 12, 1998, the Eleventh Circuit denied Bolt's Petition for Rehearing and Suggestion of Rehearing, en banc. (Id.)

REASONS FOR DENYING THE WRIT

Petitioners' claim that the Eleventh Circuit abused its discretion in determining that the United States District Court for the Middle District of Florida abused its discretion in denying Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b)(4) & (6) does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged. Moreover, denying the Petition for Writ of Certiorari is mandated by this Court's standards of review under Rule 10, Rules of the Supreme Court of the United States. Apparently, Petitioners are attempting to invoke this Court's jurisdiction under Rule 10(a). In so doing, however, Petitioners have failed to demonstrate the Eleventh Circuit abused its discretion in affirming the United States District Court 's denial of Petitioners' motions For relief.

A. The Eleventh Circuit did not abuse its discretion in

affirming the United States' District Court for the Middle District of Florida's Denial of Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b) (4).

The Eleventh Circuit did not abuse its discretion in affirming the denial of Petitioners' Rule 60(b)(4) Motion for Relief from Judgment. Rule 60(b)(4) grants relief from Judgment in certain circumstances where a "Judgment is void." A Judgment is not void merely because it is or may be erroneous. Marshall v. Board of Education, 575 F.2d 417, 422 (d. Cir. 1978); Lubben v. Selective Services System Local Bd., No. 27, 453 F.2d 645, 649 (St. Cir. 1972).

In the case at bar, Bolt initially filed a motion pursuant to Fed. R. Civ. P. 60(b)(4) on July 16, 1996 (ER-107). In considering Bolt's initial Rule 60(b)(4) Motion, the trial court found that Bolt had only offered a "general statement to the effect that the trial judge acted in a manner inconsistent with

the due process of law." (R-112). The trial court further found that Bolt made "no further attempt to elaborate on his conclusion concerning due process, nor [did Bolt] state any facts in support of his contention that fraud had been committed by his trial counsel." Id. However, in an effort to ensure that justice prevailed, the trial court granted Bolt a period of fifteen (15) days to set forth facts, as distinguished from conclusionary statements, to show that Bolt was indeed deprived of due process of law. Id.

Subsequently, Bolt filed an Amended 60(b)(4) Motion (R-114). On October 21, 1996, Judge Merhige filed a Memorandum Opinion indicating that Bolt had failed to provide a sufficient factual basis to support his contention that he was denied due process (R-123). Thus, Judge Merhige signed an Order denying Bolt's Motion for Reconsideration under Rule 60(b)(4) (R-124). In the Court's Memorandum Opinion, Judge Merhige specifically noted:

> An examination of the entire trial transcript reveals that the proceeding was not conducted in a manner that deprived Bolt of notice, hearing, or any other fundamental constitutional right. On the contrary, Bolt was questioned by the trial judge and Bolt's counsel in the Judge's chambers. After some discussion, Bolt voluntarily decided to dismiss his case with prejudice as to all Defendants. In exchange, the Defendants agreed to waive any action for costs against the Plaintiffs (R-124).

In the instant case, Bolt has not provided this Court with any evidence or facts to support his allegations that he was denied fundamental due process by the Eleventh Circuit. In his petition Bolt has not provided this Court with any facts which indicate that he was denied due process.

An examination of the transcript from August 11, 1994, reveals that Bolt made a reasoned decision to voluntarily dismiss his claim with prejudice (R-116, pp.36-53). In the Judge's Chambers, Bolt was questioned by Judge Merhige and his counsel, Hal Litchford, Esq. and Donald Christopher, Esq., about proceeding with the case. After some discussion, Bolt

responded "I guess we are over. Thank you very much. I guess we are all through. We will throw in the towel." (R-116, p.44). Dr. Bolt was further questioned extensively about his understanding of the Voluntary Dismissal he was about to agree to:

THE COURT:	If it is a deal at all, it is a deal they don't come after you for costs whatsoever.
MR. LITCHFORD:	All defendants.
THE COURT:	Any of the parties in this suit. Now, is that your understanding, Doctor?
DR. BOLT:	**Uh hum.**
THE COURT:	Is that what you want? Not what you want, is that what you are going to do?
DR. BOLT:	**Uh hum.**
THE COURT:	Uh hum means yes, I gather.
DR. BOLT:	**Yes, sir.**
THE COURT:	All right.

(R-116, p.45)

Thus, as the foregoing colloquy proves, the proceeding was not conducted in a manner that deprived Bolt of his due

process rights. Simply put, Bolt has failed to show any tenable due process argument, especially in light of the fact that Bolt had the opportunity to be heard prior to agreeing to dismiss all parties. As such, Bolt has offered no evidence whatsoever that the Eleventh Circuit abused its discretion in affirming the denial of his Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(4). As such, this Court should exercise its judicial discretion to deny the writ.

B. The Eleventh Circuit did not abuse its discretion in affirming the United States' District Court for the Middle District of Florida's Denial of Petitioners' Motions For Relief from Judgment under Fed. R. Civ. P. 60(b)(6).

The Eleventh Circuit did not abuse its discretion in affirming the denial of Petitioners' Rule 60(b)(6) Motion for Relief from Judgment. Rule 60(b)(6) "vests power in the Courts adequate to enable them to vacate judgments whenever such

action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390 (1949). As a result, the disposition of a Motion for Reconsideration is within the discretion of the District Court and will not be reversed absent an abuse of discretion. Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984). While seemingly severe in application, this standard furthers the compelling interests in the finality of judgments. Id.

In order for a Motion for Relief under Rule 60(b)(6) to succeed, the movant must show that relief "will accomplish justice" in an "extraordinary circumstance." Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 864, 108 S.Ct. 2194, 2205 (1988). Usually, relief will not be granted unless the moving party is able to show both injury and circumstances beyond his control prevented the ability to protect his interests. United States v. Alpine Land & Reservoir Co., 984 F.2d 1047 (9th Cir. 1993); cert. den., 510 U.S. 813, 114 S.Ct. 60 (1993).

Thus, courts have not granted relief where the party has made a deliberate litigation decision which later proved to be to his detriment. Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209 (1950). On August 14, 1996, the District Court entered an Order Denying Bolt's Motion For Relief from Judgment premised upon Rule 60(b)(6) (R-112). In the Memorandum which accompanied the Order, the Court stated the reasons behind its denial of Bolt's Rule 60(b)(6) Motion as follows:

> There must be an end to litigation. Plaintiff Bolt having consented to Judgment, and the Judgment having been entered and he having appealed that Judgment and lost, this case is at an end....[Bolt's] contention of fraud is untimely in any event. That portion of Bolt's motion which seeks to vacate the Judgment pursuant to 60(b)(6) as a result of alleged fraud will be denied.

(R-113)

Rule 60(b)(6) provides a judgment may be relieved For "any other reason justifying relief." In the instant case, Bolt has interpreted that decision literally to mean that if a party is not

happy with a previous settlement agreement, then that is a "reason" to be entitled to relief under Rule 60(b)(6). Simply put, this is not how Appellate Courts have interpreted the finality of settlement agreements. As a general rule, a party that consents to the entry of a judgment waives his right to appeal. Swift & Co. v. U.S., 276 U.S. 311, 324 (1928) (quoting Nashville, Chattanooga & St. Louis R.R. v. U.S., 113 U.S. 261, 5 S.Ct. 460 (1885)). Moreover, a consent to an entry of Judgment without reservation of the right to appeal a particular claim bars a subsequent appeal. Shores v. Sklar, 885 F.2d 760, 764 (11th Cir. 1989), cert. den., 493 U.S. 1045, 110 S.Ct. 843 (1990).

In short, Bolt has offered no evidence whatsoever that the Eleventh Circuit abused its discretion in affirming the denial of his Motion for Relief from Judgment Under Rule 60(b)(6). As such, this Court should exercise its judicial discretion to deny the writ.

CONCLUSION

For these reasons, the Petitioners' Petition For Writ of Certiorari should be denied.

Respectfully submitted,

G. Bruce Hill, Esquire
Counsel of Record
Adams, Hill, Reis, Adams,
Hall & Schieffelin
1417 East Concord Street
Orlando, Florida 32803
(407) 896-0425
Attorney for Memorial Hospital of
Ormond Beach

Dated: August 17, 1998